



Federally Speaking



Number 11

by Barry J. Lipson

*The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column **Federally Speaking**. The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA..*

LIBERTY'S CORNER

EARL OF ASH USURPS HIGH COURT AUTHORITY? In two back-to-back official administrative actions, it has been alleged that the Earl of Ash is "croftily" trying to seize the reins of power from the **Judicial Branch**, usurping the **High Court's** authority:

- A) **ATTORNEY/CLIENT PRIVILEGE.** It has been asserted that the Earl of Ash reversed the **U.S. Supreme Court's** holding in **Hunt v. Blackburn**, 128 U.S. 464, 470 (1888), that communications between a client and his attorney must be "safely and readily availed of" and "free from consequences of apprehension of disclosure," in the name of anti-terrorism, by authorizing the eavesdropping on **Attorney/client** telephone conversations, and the monitoring of attorney/client mail, when he, Ashcroft, concludes that there is a "reasonable suspicion" that such communications related to future terrorist acts (which authorization became effective even before it was published in the **Federal Register** on October 31, 2001). In defense of this action, Earl Ash left his "Croftdom" to appear before King Larry and plead his case to the Court of Public Opinion. "We're talking" only "about 13 prisoners nationally in the United States of America whom we have reason to believe would be seeking to continue with criminal activity while they are in jail," though apparently acknowledging later, that of "the 13" only "some are terrorists" (Larry King Live, November 2, 2001). However, all the Earl needs to do here is to utilize a long-standing exception to the **attorney-client privilege**, which allows a judge to permit such actions if he/she finds that such communication is aimed at furthering criminal activity. Not only would this preserve our **liberty**, but also it would allow the **Judiciary** to fulfill its role of protecting our **Constitutional** due process rights.
- B) **OVERTURNING STATE LAW.** Also, in apparent disregard of the **Judicial Branch's** and the **High Court's** ultimate exclusive authority to declare **State** statutes **unconstitutional** and to delineate the **Constitutional** boundaries between **State** and **Federal** sovereignty, **Attorney General** Ashcroft nullified the Oregon "Right to Die" statute by declaring that medical doctors who prescribe **federally controlled substances** in conformity and compliance with this **State** law would

violate and lose their **Federal Licensure**. Under the Oregon law, if two doctors agree on euthanasia and the patient has less than six months to live, a doctor may prescribe, but not administer, a lethal dose to such a terminally ill adult Oregon State residents, provided that the one to die is both able to make health care decisions for oneself and has voluntarily chosen to die. It is unclear here as to whether one, all or none of the following are the “terrorists” here, “the doctors, the patient, or perchance the **AG?**” Perhaps Earl Ash should re-visit **Constitutional Law 101**, with specific attention to the separation of powers between the judicial and administrative branches and the boundaries between **Federal** and **State** sovereignty?

A GIANT STEP (BACKWARD) FOR MANKIND? President Bush, without Congressional authority or a formal **Declaration of War**, recently signed an **Executive Order** authorizing the government to use **Special Military Tribunals** in the trial of “accused” non-citizen “terrorists,” thus apparently permitting secret trials without a jury, without the requirement of a unanimous verdict, and with only limited opportunities to confront the evidence against oneself and/or to choose one’s own lawyer, even where the “terrified accused” may be a U. S. resident and/or facing the death penalty. And the stated purpose of all this? To put alleged terrorists on trial in greater secrecy and faster than is ordinarily allowed under our **Constitution**. Indeed, to prevent such “Three Ring Circuses” as “**Constitutional Trials**” allegedly cause, representatives of the Administration have asserted that even American citizens fighting with the Taliban should be tried by such **Tribunals**.

HISTORICAL PROSPECTIVE: Such **Military Tribunals**, when last used during a declared war (World War II) to deal with a very limited number of Nazi war criminals and saboteurs, *and when authorized by Congress*, have been upheld by the **U.S. Supreme Court** in “emergency situations” (*Ex Parte Quirin*, 317 U.S. 1 (1942)).” However, even such **Congressionally** authorized **Tribunals** are only sanctioned “from [war’s] declaration until peace is declared” (see *In re Yamashita*, 327 U.S. 1, 11-12 (1946)). During this same declared war, our **Government** interned U.S. citizens of Japanese extraction, which was subsequently held to be **Unconstitutional**, and for which reparations were paid by our **Government**. As George Santayana has cautioned: “Those who cannot remember the past are condemned to repeat it.”

EXECUTIVE BRANCH REACTIONS: At least two former **U.S. Justice Department** attorneys have questioned the wisdom of using such **Tribunals** under the present circumstances. For example, former **U.S. Attorney General** Richard Thornburgh has stated that “in order for us to retain our credibility as an exemplar of the rule of law, which is really at the base of our world leadership,” even alleged terrorists should receive the full protection of our laws. And another former Justice Department Attorney has advised that this “could be seen as a **Kangaroo Court**” and should only be used “in the most extreme situations.” We have previously quoted in this column former Pennsylvania Governor and new **Homeland Security Director**, Tom Ridge, quoting Benjamin Franklin: “Those that can give up essential **liberty** to purchase a little temporary safety deserve neither **liberty** nor safety.”

CONGRESSIONAL REACTIONS: Senator Arlen Specter, senior Republican Senator from Pennsylvania and a member of the **Senate Judiciary Committee**, is one of the **Congressional** leaders who has spoken out, demanding that **Attorney General** Ashcroft appear before the **Senate Judiciary Committee** to answer questions about **President Bush's Military Tribunals**. Quoting Senator Specter: "It may be that the **Executive Branch** can justify the extraordinary and far-reaching powers called for in the **[Executive] Order**. However, even in war, **Congress** and the **Courts** have critical roles in establishing the appropriate balance between national security and civil rights. We should not forget that decades after internment **United States** citizens of Japanese extraction, the **Government** apologized paid and reparations. Vigorous **Congressional** oversight is the indispensable first step in determining what is 'practicable' in finding that balance." And from across the aisle, **Senate Judiciary Committee** Chair Patrick Leahy advised that what matters is that we protect the **Constitution** and "maintain public confidence in our system of laws," and not whether an action is popular or unpopular. "We can be both tough on terrorists and true to the **Constitution**."

JUDICIAL REACTIONS: We have also previously quoted in this column **United States Supreme Court** Justice Sandra Day O'Connor, quoting Margaret Thatcher: "Where law ends, tyranny begins." There is now one more quote to add, a direct quote, from **United States Supreme Court** Justice David H. Souter: "When you are dealing with people, be careful!" At the post-9/11 **2001 Third Circuit Judicial Conference**, Justice Souter thus cautioned, using an extensive discussion of the Japanese internment litigation and the surrounding subsequently condemned Governmental actions, as illustrative of what disregard for this caution, and the afore-quoted cautions of Prime Minister Thatcher, Statesman Franklin and Historian Santayana, could cause.

YOU CAN QUOTE ME! It is heartening that such cautions have apparently been whole heartedly adopted and endorsed by current high level representatives of the **Legislative, Judicial** and even **Executive Branches** of our **Federal Government**. It would be hoped that all **Public Officials**, even in this time of increased tensions, would give more than just lip service to these re-affirmations of the necessity to maintain our **liberties** at all times, and especially in times of adverse circumstances. "It must be remembered, that if we annihilate every terrorist, but in the process lose any portion of our **liberty**, they have won!" *You can quote me!*

MORE RULE BY EXECUTIVE ORDER - WHO NEEDS CONGRESS? In 1978, in the wake of **Watergate**, **Congress** made most **Presidential papers** available for public scrutiny after a period of twelve years has past. That would begin to place **Reagan-era** documents in the public domain right about now. Not to worry! **President Bush** by **Executive Order** has reversed this indiscretion on the part of **Congress** and now the **then President** or the **present President** can block the release of such documents. This appears to be yet another Administrative Branch usurpation of the powers of the other Branches. By the way, the majority of responses to the non-scientific KQV "daily poll" labeled as "dirty pool" this de facto repeal of an **Act of Congress**.

POST SCRIPT. Both **Houses of Congress** have ordained "a **National Day of Reconciliation**" where both **Houses** "*shall* assemble in the Hall of the House of

Representatives” and “during this assembly, the Members of the two **Houses** *may* gather to humbly seek the blessings of Providence for forgiveness, reconciliation, unity, and charity for **all** people of the United States, thereby assisting the **Nation** to realize its potential as the champion of hope, the vindicator of the defenseless, **and the guardian of freedom**” (emphasis added). Moreover, apparently some believe that daily prayer needs to be especially ‘*incited*’ for the **Office of the President** and/or the **President**, and have formed the **Presidential Prayer Team** to do the job! It’s expressed “goal” is to “*incite* daily prayer for the **Office of the President**,” and to accomplish this it is engaged in “a unique effort to mobilize 1% of the population-2.8 million people-to pray daily for the **President**.” For more information see <http://www.presidentialprayerteam.org>.

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THE ‘DUMB AND HUNGRY’ DEFENSE. That was how the former chairman of Sotheby’s, A. Alfred Taubman, was defended by Polk Davis & Wardwell, against charges of fixing “nonnegotiable fee schedules” with Christie’s in the live auctioning of fine art, jewelry and furniture, a market in which between them they controlled a ninety percent share. PD&W argued that this shopping mall entrepreneur and self-made millionaire lacked the interest or knowledge to “cook up” such a scheme, even “actually” falling “asleep occasionally” at Board meetings, and offered the testimony of Sotheby’s former CEO and current CFO that he “did not really have an understanding of our bottom line,” he “was more concerned with what was for lunch.” The U.S. Department of Justice, however, countered to the Jury: “You don’t become a millionaire without knowing how to read the bottom line,” and won a guilty verdict in this criminal antitrust prosecution, which could result in Mr. Taubman spending up to three years in Federal prison and being personally fined as much as \$350,000. Some might say that PD&W were “dumb” here, but they certainly aren’t “hungry” if they followed the traditional wisdom of criminal defense counsel, to wit, “get paid up front!”

TO TAX OR NOT TO TAX? Recently, my e-mail shuddered with the warning that ‘**Bill 602P** will permit the **Federal Government** to charge a 5-cent surcharge on every e-mail delivered,’ with such tax payments allegedly to go to the **U.S. Postal Service** as “alternative postage fees”. This was promptly followed by a “Sorry about this, but the e-mail I just sent everyone is a hoax...sorry” (though future taxes on the use of the Internet and/or on Internet transactions may, indeed, still come to pass). True, in 1992 the **U.S. Supreme Court** banned **States** from collecting taxes from Internet, catalog, or other “remote” transactions, if the retailer did not had a physical presence in the taxing **State**. But, the **States** are working on a simpler and more streamlined sales tax process to sell to **Congress** and E-commerce companies now do business, if not actually having a “physical presence,” in all 50 **States**? However, by the time you read this, the **President** will have signed into law a **Bill**, passed by both **Houses**, extending the current **federal moratorium** on new Internet taxes (which had expired on October 21, 2001), for two more years. “The administration believes that government should be promoting Internet usage and availability, not discouraging it with access taxes and discriminatory taxes,” said a **White House** statement supporting this legislation. If this moratorium continues through 2011, it has been estimated that in the ten years between 2001 and 2011, consumers will save an estimated \$440 billion in non-charged sales and use taxes. So buy now, during the “not to tax” period! Moratoriums do not last forever!

Usa today scooped ON MODERN-DAY SLAVERY! In a November 19, 2001 “Special Report” Cover Story entitled “Forced Labor in America,” **USA Today** reported “There is a new face in America. One that’s often overlooked because victims are hidden in a modern-day version of a sweatshop: the private home,” to wit, non-spousal alien domestic slavery. But in the October 5, 2001 issue of **Federally Speaking**, under the heading “**Slavery In The New Millennium**,” we reported on “the use of threats, violence and crack cocaine to enslave homeless African-Americans, forcing them to pick oranges,” and other instances of modern-day American slavery including “Russian women being recruited and imported into the United States after being told that they would be given work as legitimate dancers, waitresses and entertainers, but instead, being forced to work as erotic dancers and prostitutes; and Mexican farm workers being smuggled into the United States and then held and forced to work for their captors to pay off their ‘smuggling fees’.” However, as you my suspect, slavery of any kind is still unlawful. Accordingly, **Assistant Attorney General** Ralph F. Boyd of the **U.S. Justice Department's Civil Rights Division**, has advised that: “Forcing any individual into slavery-like working conditions is reprehensible and illegal in modern-day America.” (See Involuntary Servitude and Peonage, [18 U.S.C. Sections 1581, 1584](#).) To prevent such exploitation as exposed by **Federally Speaking** and also by **USA Today**, the **National Worker Exploitation Task Force (WETF)** was created in April 1998. It is chaired by the **U.S. Assistant Attorney General for Civil Rights** and the Solicitor of the **U.S. Department of Labor**, and today includes 15 regional task forces. Cases of slavery or “trafficking in persons,” may be reported to the **WETF** complaint line at 1-888-428-7581. See also <http://www.usdoj.gov/crt/crim/wetf>.

CANADIANS GIVE GOOD U.S. ANTITRUST ADVICE. The Canadian Competition Bureau recently issued “scenarios” indicative of possible illegal bid rigging, which are as useful under the **U.S. Antitrust Laws** as under the **Canadian Competition Act**. To wit: “As a Buyer have one or more of your firms encountered any of the following scenarios? *Some projects cost more than planned? *Some suppliers never bid on your project? *You receive two or more identical bids on the same project? *A particular supplier always submits the lowest price on your project? The highest price...? Any of these scenarios may indicate you have been the victim of bid-rigging.” But U.S. white-collar criminals are cleverer than that, right? You’d be surprised!!!

OUR FTC CHALLENGE -- STILL NOT ANSWERED! Two **Federally Speaking** columns back we “exposed” the prevalent problem of sellers adding disguised and/or hidden charges to consumer products and services. We then challenged the **FTC** to protect consumers from these “clearly deceptive and ‘unfair trade practices’.” We have again called the attention of **Federal Trade Commission** Chairman Timothy J. Muris to this most prevalent problem, but as of the date this column went to the printers, we have still not received any response.

THE FEDERAL CLE CORKBOARD™

The 2002 FBA LearnAbout™ Luncheon Series (Open to All) will devote all 12 hourly monthly sessions (including an hour of Ethics) to **“The Anatomy of a Federal Case – From Start to Finish.”** This year’s series will be at Noon, the third Thursday of each month at the Engineers Society. It will start on Thursday, **January 17, 2002** with the Clerk of Court James Drach and Robert Barth who will explain all about the Clerk’s office,

PACER, E-filing and their Website. "Eat your way through your CLE." For information and reservations call Arnie Steinberg (412/434-1190).

The 2002 FBA Lunch With A Federal Judge Series (Open to FBA members) will continue on Tuesday, **January 15, 2002**, with Magistrate Judge Kenneth J. Benson, at Noon at the Engineers Society. Call Susan Santiago for reservations (412/281-4900).

*The purpose of **Federally Speaking** is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the **Federal CLE Corkboard™**. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com).*

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